VERNER · LIIPFERT
BERNHARD · MCPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

WRITER'S DIRECT DIAL
(202) 371-6060

December 19, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of the Lower Colorado River Authority in CC Docket Number 96-45

Dear Mr. Caton:

Enclosed please find an original and four (4) copies of the Comments of the Lower Colorado River Authority in the above-captioned docket. One copy of the Comments have also been sent to International Transcription Service.

Please direct any questions that you may have to the undersigned.

Sincerely,

Thomas J. Keller

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on	)	
Universal Service	)	
	)	

COMMENTS OF THE LOWER COLORADO RIVER AUTHORITY

Thomas J. Keller
Kathy D. Smith
Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Counsel for the Lower Colorado
River Authority

December 19, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on	)	
Universal Service	)	
	)	

COMMENTS OF THE LOWER COLORADO RIVER AUTHORITY

The Lower Colorado River Authority ("LCRA"), by its attorneys, hereby respectfully submits comments regarding the Recommended Decision (released November 8, 1996) of the Federal-State Joint Board ("Joint Board") in the above-captioned proceeding. LCRA's comments are directly solely at the Joint Board's recommendations regarding contributors to the recommended universal support funding mechanisms.

LCRA is a non-profit, governmental agency of the State of Texas and a public power company providing electric, water and environmental services to 58 counties in central Texas. To support its internal business functions and ensure system reliability, LCRA operates a far-reaching, private telecommunications infrastructure and information processing system. They include an extensive electric transmission system to which fiber optic lines are being added, an analog microwave system which is being upgraded to digital, a new 900 MHz trunked radio system which will cover LCRA's service area, and a Local/Wide Area Network connecting LCRA's main office complex to its remote sites.

I. Section 254(d) of the Telecommunications Act of 1996

The Telecommunications Act of 1996 (the "1996 Act") provides that every "telecommunications carrier that provides interstate telecommunications services" must contribute to the universal support mechanisms established by the Commission.[1/] The 1996 Act also permits the Commission to require any "other provider" of telecommunications to contribute to universal service if the public interest so requires.[2/] The statute defines a "telecommunications carrier" to be "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[3/] A "telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[4/] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[5/]

1/ Telecommunications Act of 1996, Pub. L. No. 104-104, § 254(d), 110 Stat. 56, 73 (1996) (codified at 47 U.S.C. § 254(d)).

2/ Id.

3/ 47 U.S.C. §153(44). The term "aggregator" means "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

4/ 47 U.S.C. § 153(46).

5/ 47 U.S.C. § 153(43).

II. The Joint Board's Recommendations Regarding Mandatory Contributors to the Universal Service Mechanisms.

In general, the Joint Board recommended that the Commission construe broadly the statutory mandate that all "telecommunications carriers" that provide "interstate telecommunications services" contribute to universal service. The Joint Board specifically suggested that any entity that provides on a wholesale, resale or retail basis any of the "interstate telecommunications" it listed should contribute to universal support mechanisms to the extent it provides such interstate telecommunications services.[6/]

The Joint Board also recommended that "wholesale carriers," carriers that provide services to other carriers, should be required to contribute, because such carriers' activities are included in the phrase "to such classes of eligible users as to be effectively available to a substantial portion of the public."[7/] It noted that the FCC has interpreted the quoted phrase to mean "systems not dedicated exclusively to internal use," or systems that provide service to other than significantly restricted classes.[8/] As an example of what it means by this recommendation, the Joint Board suggested

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6/ Id. at ¶ 789. The Joint Board recommended that "interstate telecommunications" include, but are not limited to the interstate portion of the following list: cellular telephone and paging, mobile radio, operator services, PCS, access, alternative access and special access, packet switched, WATS, toll-free, 900, MTS, private line, telex, telegraph, video, satellite, international/foreign, intraLATA, and resale services. Id. at ¶ 785.

7/ Id. at ¶ 788.

8/ Id.

that a PMRS MSS[9/] provider that leases capacity to other carriers should be required to contribute to the extent it leases capacity to other carriers.[10/]

The Joint Board also recommended that the FCC interpret the expression "for a fee" in the definition of "telecommunications carrier" to mean services rendered in exchange for something of value or a monetary payment. It expressly rejected the position that "for a fee" means for profit. The Joint Board concluded that all interstate telecommunications carriers, including wholesalers and non-profit organizations, should contribute to the universal service fund to the extent they are providing interstate telecommunications services.[11/]

The Joint Board noted that, under the statute, the FCC may require any "other provider" of telecommunications to contribute to universal service if the public interest so requires.[12/] However, the Joint Board recommended that "other providers" of telecommunications not be required to contribute to universal support mechanisms at this time, because it concluded that such providers do not substantially benefit from the public switched telecommunications network.[13/] In reaching this conclusion, the Joint Board recognized that the statute makes a distinction between

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9/ A "PMRS MSS provider" is a "private mobile radio service mobile satellite service" provider, which, for example, may provide mobile telephone service to consumers via satellite.

10/ Id.

11/ Id. at ¶ 789.

12/ Id. at ¶ 792.

13/ Id. at ¶ 794.

telecommunications offered on a private-service basis without incurring common carrier obligations.[14/] However, the Joint Board determined that "other providers" refers only to entities that provide telecommunications to meet their own internal needs or that provide services free-of-charge. It further concluded that to the extent "other providers," such as private network operations, offer interstate telecommunications services, they should be required to contribute to universal support mechanisms.[15/]

III. LCRA's Position

LCRA strongly supports the Joint Board's recommendation that "other providers" of telecommunications not be required to contribute to universal support mechanisms at this time. LCRA is not a "telecommunications carrier" within the meaning of the 1996 Act and believes that non-profit entities that operate their own telecommunications network on a private-service basis should remain free from any obligation to contribute to universal support mechanisms. As the Joint Board noted, the statute makes a distinction between telecommunications offered on a private-service basis and those offered on a common carrier basis with attendant common carrier obligations such as mandatory contributions to universal support mechanisms.

However, LCRA disagrees with the Joint Board's characterization of "other providers" as referring only to entities that provide telecommunications to meet their own internal needs or that provide services free-of-charge. In the past, the Commission has permitted an array of "private" operators, including electric utilities, to

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14/ Id. at ¶ 792.

15/ Id.

use radio spectrum to serve both their own internal communications needs and those of specific business or state or local governmental entities without being subject to the obligations of common carriers, such as contributions to universal service mechanisms. Under Commission rules, private operators in general are permitted to lease excess capacity on their microwave systems or to provide service to other entities on a for-profit basis and still not be classified as common carriers so long as they do not carry common carrier traffic.[16/] The sale or lease of excess fiber capacity is also a commonplace occurrence which the Commission to date has refrained from regulating as common carriage.[17/] The Commission's policies in this regard have been entirely consistent with the definition of private carriage set forth by the court in National Association of Regulatory Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976)("NARUC I")[18/].

LCRA urges the Commission to reject the Joint Board's narrow interpretation of "other providers" of telecommunications services and to construe the statute in a

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16/ See e.g., 47 C.F.R. §§ 101.135, 101.603 (private operational fixed point-to-point microwave services); see also, General Telephone Company of the Southwest, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 6778 (1988); Public Service Company of Oklahoma, Declaratory Ruling, 3 FCC Rcd. 2327 (1988).

17/ See e.g., Lightnet and Section 214 Application to Construct Fiber Optic System in Florida as Part of Interstate Network, Memorandum Opinion and Order, 58 Rad. Reg. 2d (P & F) 182 (1985); Norlight Declaratory Ruling, 2 FCC Rcd. 132, recon. 2 FCC Rcd. 5167 (1987).

18/ In NARUC I, the court held that a common carrier is either required to hold out its service to all people indifferently or in fact chooses to do so. NARUC I, 525 F.2d at 641. On the other hand, private operators enter into individually negotiated medium-to-long term contracts with a relatively stable customer base having compatible service needs with that of the operator and its other customers. Id. at 641-643.

manner consistent with well-settled judicial precedent in this area and the Commission's long history of permitting private operation, including the sale or lease of excess capacity to other entities. To reach any other conclusion would seriously disrupt existing relationships, including electric utility use of these communications systems, and would significantly impair LCRA's ability to share its communications system with other public, nonprofit and governmental agencies.

LCRA is also concerned about the Joint Board's recommended interpretation of the term "telecommunications service" for purposes of implementing the universal service funding mechanisms under the 1996 Act. The Joint Board recommended that the Commission interpret the expression "for a fee" in the definition of "telecommunications service" to mean services rendered in exchange for something of value or a monetary payment. This interpretation is significantly more expansive than the Commission's interpretation of this expression in the Interconnection Order.[19/] In the Interconnection Order, for example, the Commission made it clear that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services."[20/] The Commission concluded that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service."[21/] In the instant case,

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19/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185 (August 8, 1996), 61 Fed. Reg. 45,476 (1996).

20/ Id. at ¶ 994.

21/ Id.

LCRA urges the Commission likewise to interpret the phrase "for a fee" as excluding cost-sharing arrangements.

Conclusion

For the foregoing reasons, LCRA urges the Commission to adopt rules that do not require non-profit, private network operators to make mandatory contributions to universal service mechanisms.

Respectfully submitted,

LOWER COLORADO RIVER AUTHORITY

By: _____

Thomas J. Keller
Kathy D. Smith

Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Its Attorneys

Dated: December 19, 1996

CERTIFICATE OF SERVICE

I, Renee K. Kernan, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 19th day of December, 1996, a copy of the Comments of the Lower Colorado River Authority was mailed, first-class, postage prepaid to:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

The Honorable Julia Johnson
Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure
Commissioner
Missouri Public Service Commission
301 W. High Street, Suite 530
Jefferson City, MO 65101

The Honorable Sharon L. Nelson
Chairman
Washington Utilities and
Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

The Honorable Laska Schoenfelder
Commissioner
South Dakota Public Utilities
Commission
State Capitol, 500 E. Capitol St.
Pierre, SD 57501-5070

Martha S. Hogerty
Public Counsel for the State of Missouri
P.O. Box 7800
Jefferson City, MO 65102

Paul E. Pederson
State Staff Chair
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Lisa Boehley
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, DC 20554

Charles Bolle
South Dakota Public Utilities
Commission
State Capitol, 500 E. Capitol St.
Pierre, SD 57501-5070

Deonne Bruning
Nebraska Public Service Commission
300 The Atrium
P.O. Box 94927
Lincoln, NE 68509-4927

James Casserly
Federal Communications Commission
Office of Commissioner Ness
1919 M Street, Room 832
Washington, DC 20554

John Clark
Federal Communications Commission
2100 M Street, N.W., Room 8619
Washington, DC 20554

Bryan Clopton
Federal Communications Commission
2100 M Street, N.W., Room 8615
Washington, DC 20554

Irene Flannery
Federal Communications Commission
2100 M Street, N.W., Room 8922
Washington, DC 20554

Daniel Gonzalez
Federal Communications Commission
Office of Commissioner Chong
1919 M Street, N.W., Room 844
Washington, DC 20554

Emily Hoffnar
Federal Communications Commission
2100 M Street, N.W., Room 8623
Washington, DC 20554

L. Charles Keller
Federal Communications Commission
2100 M Street, N.W., Room 8918
Washington, DC 20554

Lori Kenyon
Alaska Public Utilities Commission
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

David Krech
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, DC 20554

Debra M. Kriete
Pennsylvania Public Utilities
Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Diane Law
Federal Communications Commission
2100 M Street, N.W., Room 8920
Washington, DC 20554

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter building
Tallahassee, FL 32399

Robert Loube
Federal Communications Commission
2100 M Street, N.W., Room 8914
Washington, DC 20554

Samuel Loudenslager
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0400

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Philip F. McClelland
Pennsylvania Office of Consumer
Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Michael A. McRae
D.C. Office of the People's
Counsel
1133 - 15th Street, N.W., Suite 500
Washington, DC 20005

Tejal Mehta
Federal Communications Commission
2100 M Street, N.W., Room 8625
Washington, DC 20554

Terry Monroe
New York Public Service Commission
3 Empire Plaza
Albany, NY 12223

John Morabito
Deputy Division Chief
Accounting and Audits
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, DC 20554

Mark Nadel
Federal Communications Commission
2100 M Street, N.W., Room 8916
Washington, DC 20554

John Nakahata
Federal Communications Commission
Office of the Chairman
1919 M Street, N.W., Room 814
Washington, DC 20554

Lee Palagyi
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive, S.W.
Olympia, WA 98504

Kimberly Parker
Federal Communications Commission
2100 M Street, N.W., Room 8609
Washington, DC 20554

Barry Payne
Indiana Office of the Consumer Counsel
100 North Senate Ave., Room N501
Indianapolis, IN 46204-2208

Jeanine Poltronieri
Federal Communications Commission
2100 M Street, N.W., Room 8924
Washington, DC 20554

James Bradford Ramsay
National Association of Regulatory
Utility Commissioners
P.O. Box 684
Washington, DC 20044-0684

Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Gary Seigel
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, DC 20554

Richard Smith
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, DC 20554

Pamela Szymczak
Federal Communications Commission
2100 M Street, N.W., Room 8912
Washington, D.C. 20554

Lori Wright
Federal Communications Commission
2100 M Street, N.W., Room 8603
Washington, D.C. 20554


Renee K. Kernan